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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 384.

CORNELL STEAMBOAT COMPANY,

Appellant,

against

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and NATIONAL WATER CARRIERS ASSOCIATION, INC.,

Respondents.

BRIEF FOR APPELLANT.

ROBERT S. ERSKINE,
Counsel for Appellant.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

PAGE

STATEMENT:

1. Nature of the Proceedings 1
2. Nature of the appellant's business 3
3. Transportation Act of 1940, Part III 5
4. The Proceedings below 8
   - A. Before the Commission's Examiner 8
   - B. Before Division 4 9
   - C. Before the Commission, on re-argument 10
   - D. Before the District Court 10
5. The three issues now presented by the appellant 10

FIRST POINT.—A tower does not engage in the business of a carrier, and is not a carrier, in law and in fact 11

SECOND POINT.—As the non-carrier status of independent towers has been well established, has Congress converted them into common carriers by the provisions of Part III, and would such a conversion be constitutional, even if Congress intended it? 20

THIRD POINT.—It is not the ownership and operation of tugboats, per se, but the character of the business engaged in by their owner which determines the "non-carrier" status of the independent tower 23

FOURTH POINT.—The District Court and the Commission have distorted the common and accepted meaning of plain words as used by Congress in Part III 27

FIFTH POINT.—Even if the appellant can be subjected to the Act, as a carrier, its towages between places in New York state are not interstate within the plain definition in Section 302(i)(1) 31

SIXTH POINT.—If Part III has altered the status of independent towers to that of carriers, the appellant should be classed only as a contract carrier 37

CONCLUSION 38

List of Authorities.

	PAGE
Aldrich v. *Pennsylvania R. R. Co.*, 255 Fed. 330	14
Allen v. *Sackrider*, 37 N. Y. 341, 342	17
Anita D, The, 28 Fed. Supp. 361, 363	15
Ashwaubemic, The, 3 F. (2d) 782, 783	15
Authentic, The, 15 Fed. Supp. 780, 781	15
Bellatrix, The, 114 F. (2nd) 1004, 1007	15
Bradley v. *Lehigh Valley R. Co.*, 145 Fed. 569	18
Brady v. *Roosevelt SS Co.*, 317 U. S. 575	22
Carlin v. *N. Y., N. H. & H. R. R. Co.*, 135 N. Y. App. Div. 876, 880	35
Chicago etc. Ry. Co. v. *Petroleum Refining Co.*, 39 F. (2d) 629	29
Cincinnati etc. Packet Co. v. *Bay*, 200 U. S. 179	36
Cornell Stmbt. Co. v. *Sohmer*, 235 U. S. 549	35
Coup v. *Wabash, etc. Ry. Co.*, 56 Mich. 111	14
Dorr v. *New Jersey Steam Nav. Co.*, 11 N. Y. 485	17
Eastern, The, 280 Fed. 711, 712	14
Ferguson v. *Ross*, 126 N. Y. 459	35
Frost Trucking Co. v. *R. R. Comm'n*, 271 U. S. 583	21
Hardy, The, 229 Fed. 985, 986	15
Hicklin v. *Coney*, 290 U. S. 169	20
Hugh O'Donnell, 22 F. (2d) 410	25
J. P. Donaldson, 167 U. S. 599, 603	14
L. P. Dayton, 120 U. S. 337, 351	14
Margaret, The, 94 U. S. 494, 496	14
Maurice R, The, 3 Fed. Supp. 86, 89	15
Mengel Co. v. *Inland Waterways Corp.*, 34 Fed. Supp. 685	15
Michigan Comm'n v. *Duke*, 266 U. S. 570	21
Murrell, The, 200 Fed. 826	18, 29
New Orleans, etc., Towboat Co. v. *U. S.*, 86 F. (2d) 53, 60	14

	PAGE
People v. *Central R. R. of New Jersey*, 42 N. Y. 283	35
Propeller Niagara etc. v. *Cordes, et al.*, 62 U. S. 7, 22	16
Propeller Burlington, The, 137 U. S. 386, 391	14
Rodenbough v. *United States*, 25 F. (2d) 13	27
Sacramento Nav. Co. v. *Salz*, 273 U. S. 326, 328	12, 18, 24, 25
Smith v. *Cahoon*, 283 U. S. 553	21
Southern Towing Co. v. *Egan*, 184 Fed. 275, 277	15
Status of Wharfingers, 251 I. C. C. 613	23
Steamer Webb, 14 Wall. 406, 414	14
Stevens v. *The White City*, 285 U. S. 195, 200	12
Stephenson v. *Binford*, 287 U. S. 251	17, 20
Stimson Lumber Co. v. *Kuykendall*, 275 U. S. 207	26
Sturgeon Bay etc. Co. v. *Leathem*, 45 Northeastern Rep. 422	13, 19
Sun Oil Co. v. *Dalzell Towing Co.*, 287 U. S. 291, 294	14
Ten Eyck v. *Director General, etc.* (*of R. R.*), 267 Fed. 974	14
Thorn v. *Browne*, 257 Fed. 519	28
Turecamo v. *United States*, 125 F. (2d) 1001	14
Union Barge Line, 250 I. C. C. 689	15, 24
Union Stock Yard Co. v. *U. S.*, 308 U. S. 213	22
United States v. *Ramsey*, 197 Fed. 144, 146	17
United States v. *Temple*, 105 U. S. 97	27
Webster's International Dictionary	28
Wells v. *Steam Nav. Co.*, 2 N. Y. 204, 208	13
Westerlund v. *Black Bear Mining Co.*, 203 Fed. 599	27

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CORNELL STEAMBOAT COMPANY,
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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and NATIONAL WATER CARRIERS ASSOCIATION, INC.,
Respondents.

Appeal from the District Court of the United States for the Southern District of New York.

BRIEF FOR APPELLANT.

STATEMENT.

1. Nature of the Proceedings:

This is an appeal from a decision and order of a statutory court of three judges in the Southern District of New York (Frank, C. J., Coxe, and Bright, D. JJ.), denying a petition to enjoin, set aside, suspend and annul, a certificate and order of the Interstate Commerce Commission under which Cornell Steamboat Company, although engaged only in furnishing towage services for hire, was certified to be a common carrier by water in interstate commerce, and held subject to regulation by the Commission under Part III of the Transportation Act of 1940.

Previously to the said Act (approved September 18, 1940), this Court and the lower Courts had repeatedly found that, in law and in fact, an independent tower for hire, such as this appellant, was not a common carrier and was not a carrier at all.

Thus, the principal question presented in these proceedings is whether Congress, by the provisions of Part III of the Act, suddenly changed the long established status of independent towers from that of non-carriers to that of common carriers by water.

In the provisions of Part III, Congress specifically authorized the Commission to regulate only common carriers and contract carriers by water in interstate commerce. The Act contains no pronouncement of Congress to include in those two categories any other persons than the common or contract carriers previously defined by the Courts and previously known and recognized under the established law and the existing usages of the business world.

Therefore, in determining the principal question, stated above, there are the co-related questions (1) whether an executive tribunal, such as the Interstate Commerce Commission, can assert its own interpretation of the Act to make such a drastic change in the status of independent towers, in the absence of specific enactment by Congress, and (2) whether the conversion of a non-carrier into a common carrier, for purposes of regulation, would be constitutional, even if Congress had intended it.

If the appellant can be held subject to the Act at all, there are two subsidiary questions,—(a) whether its towages between points in New York State are interstate, under the definition found in Section 302(i)(1) of Part III; and (b), whether it should be classed as a contract, rather than a common carrier.

2. The nature of the appellant's business.

For over 100 years, successive generations of the same family have owned the appellant and its predecessor organizations, the business having been incorporated in 1878.* It engages solely in the business of furnishing towage services for hire, as an independent tower, and was so engaged on January 1st, 1940. The word "independent" is used herein to emphasize the fact that appellant has no direct or indirect financial interest in, or connection with, any person or company engaged in the business of a carrier. It does not carry passengers or merchandise on its tugs, and does not own or operate any "carrying" vessel. It does not enter into any contracts with owners of merchandise or property for the carriage thereof.

It does not take possession of the vessels which it tows or the cargoes laden thereon,—those vessels and their cargoes remaining in the possession and care of their captains and crews who are employees of the owners of the carrying vessels.

Its services are rendered by its fleet of steam and diesel tugboats, which merely attach their lines to and move the "carrying" vessels from point to point as ordered by the owners or operators of those vessels. Most of the vessels towed are barges, scows, canalboats, and similar craft which have no motive power.

Over 95% of appellant's annual towage services are rendered on the Hudson River (except when navigation is closed by ice in the winter), between New York City and other points in New York State as far north as Waterford. The balance of its services are in the waters surrounding

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* This and the following statements of facts are summarized from the report of Examiner Wilkins (R. 16-24), based upon the uncontradicted testimony of the appellant's president, Frederick Coykendall.

New York City (the Harlem and East Rivers and New York Bay), and occasionally to points in New Jersey on the west side of the Bay or the lower end of the Hudson.

The appellant has no interest in and often does not know the nature of the cargoes in the vessels towed. It has no voice or interest in any contracts of carriage between the barge owners and the owners of the merchandise. It issues no bills of lading for the cargoes on the vessel towed, and has no interest in, and does not share, any freights paid by the cargo owners to the barge owners. It has no interest in, and frequently has no knowledge of the origin or final destination of the cargoes on the vessels towed. It has nothing to do with their loading or discharging, delivery or forwarding. Its services commence when its tugs take the boats in tow, and end when the boats are moored or docked at their destination. It is not liable to either the boats or their cargoes as an insurer or bailee, but only for proved negligence in the performance of the towage services: and as a tower, it can and frequently does contract for a release from liability for negligence.

Some of its larger customers carry their own products upon their own barges, but that fact in no way alters the nature of the appellant's towage services, for such cargoes, like all others, remain in the possession and care of the captains and crews of the "carrying" vessels, and the appellant merely contracts to tow those vessels.

The appellant's towage charges are wholly independent of and have no relation to the carriage of the merchandise by the barges or any freights paid therefor, and are secured by maritime liens against the vessels towed,—not against their cargoes. The appellant's towage charges are based upon the length of the trip and the size and tonnage of the

vessel towed. The towage services can be furnished, if required, to a single barge at a time, but will then cost the customer more per barge than if several barges are towed together in a flotilla.

Over 85% of appellant's services are furnished under time contracts entered into for periods of one to three years. The balance of the services represent miscellaneous business under contracts arranged from day to day. The appellant does not advertise its services, and does not hold itself out to tow for all-comers. To the contrary, it frequently declines to tow, and enters into contracts only when its tugs are available and the work can be done under terms and conditions satisfactory to it.

3. The Transportation Act of 1940, Part III.

In Part III of the Act, relating to transportation by water, sections 309(a) and 309(f) authorize the Commission to certify (or issue permits to) and regulate common carriers by water and persons engaged in the business of contract carriers by water, in interstate commerce. Persons so engaged in business on January 1st, 1940 (some 8 months before the Act was approved), were granted "Grandfather Rights", entitling them to receive their certificates or permits automatically.*

> "Sec. 309.(a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such

* The sections of Part III are referred to herein by the numbering used in the original official printing of the Act and adopted by the Commission and the District Court in their opinions; and copies of the original printing will be handed to this Court at the time of argument.

carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. * * *"

Section 309(f) contains similar provisions for permits to persons engaged in the business of contract carriers by water, with similar "Grandfather Rights".

No other persons are required by Part III to obtain certificates or permits from the Commission.

In the absence of any statement to the contrary, the references to persons who were engaged in the business of common and contract carriers before the Act was passed plainly indicate that Congress was not creating any new categories, but was merely regulating common and contract carriers by water as known and defined previously to the Act.

The definitions of common and contract carriers in Section 302, (c), (d) and (e), add nothing to the common law definitions, under which the courts have consistently held that an independent tower is not a carrier.

Section 302 (f) (g) and (h) describe the transportation facilities which, when furnished and used by the carriers, shall be included in the scope of the Commission's regulation.

Towage services, even when performed for carriers subject to the Act, are specifically excluded by Section 303 (f) (1) and (2), and part III contains no other mention of towers, tugs, or towage services.

The other sections of Part III specifically relate to "carriers" of passengers or merchandise in the usual legal and business sense. For instance, Section 303 exempts various types of carriage, such as bulk cargoes, liquid cargoes in tank vessels, carriage not in competition with rail carriers, etc. Section 318 provides that "no common carrier by water shall deliver or relinquish possession at destination of any freight transported by it" except upon payment of charges, etc. Section 306 relates to the tariffs and schedules of rates for passengers and merchandise to be filed by the carriers. Other sections of Part III contain various administrative provisions with respect to the Commission's regulation of the "carriers".

In several instances, Congress, in Part III, expressly narrowed the regulation of water carriers as compared with rail and motor carriers, as in the exemption of bulk cargoes and liquid cargoes in tank vessels, Sections 303(b), (c) and (d), and in the exemption of transportation by water between states when performed within the limits of a single harbor or between places in contiguous harbors, Section 303(g). And nowhere is that differentiation more plainly stated than in the special definitions of interstate commerce for water carriers, in Section 302(i), of which the clauses which are material to the present matter are:

> "302(i) The term 'interstate or foreign transportation' or 'transportation in interstate or foreign commerce' as used in this part, means transportation of persons or property——
>
> "(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States."

4. The proceedings below:

Shortly after the passage of the Act, the Commission's Bureau of Water Carriers announced an administrative ruling that independent towers were considered to be carriers and therefore subject to Part III. The appellant, disputing the Bureau's interpretation of the language and intent of the Act, filed an application, under protest, for a contract carrier permit under Section 309(f), expressly reserving its contention that it is not a carrier (R. 71-79): and at the same time appellant filed a petition for a dismissal of the application, on that ground. (R. 11-16.) That procedure was adopted at the suggestion of the Bureau, in order to obtain a final ruling on the questions in dispute. The petition also asked the Commission to find that towages between points in New York State are not interstate. (R. 12.)

A. Before the Commission's Examiner.

Examiner Wilkins, after receiving the uncontradicted testimony of the appellant's operations as an independent tower, filed a report recommending that a permit be issued to your appellant authorizing the "continuance" of its operations, as a contract carrier. (R. 16-24.) The Examiner, ignoring the fact that persons,—and not vessels,—are to be regulated under Part III, considered that towboats are instrumentalities of transportation, and that towage

of a "carrier's" barge amounts to transportation of the barge and its cargo,—e. g., that the tug "carries" the barge and any cargo in it. The Examiner made no attempt to reconcile his conclusions with the established law that "towage" is not "carriage". As to the appellant's status in interstate commerce, he gave no specific consideration to the application of Section 302 (i) (1) to towage services between points in New York State.

B. Before Division 4.

On exceptions to the Examiner's report, Division 4 (Commissioners Porter, Mahaffie and Miller), concluded that your appellant should be certified to "continue in business" as a common carrier. (R. 24-44.) In effect, Division 4 held that Congress intended the Commission to include in the category of "carriers", for regulation under the Act, persons who are not "carriers", without altering their non-carrier status when sued in court for damages. (R. 32-33.) That bewildering conclusion was reached (1) by stating that the "non-carrier" status of towers had previously been established by the Courts only in suits for loss or damage (a statement which is inaccurate) and (2) by interpreting Section 320(d) as giving the Commission a free hand in reaching its own classification of "carriers", while preserving to any person regulated by the Commission his rights and status before the Admiralty Courts under the maritime law.

On the question of interstate commerce, although towages between points in New York State are not "from a place in a State to a place in another State," Division 4 concluded that Congress intended Section 302(i) (1) to receive the interpretation previously given to the definition of interstate commerce provided for rail and motor carriers (in spite of the specific difference in language), and held that

the possible passage of appellant's tugs through waters of the lower end of the Hudson lying over the New Jersey boundary line, when performing services between points in New York State, should be deemed "interstate." (R. 37-39.)

C. Before the Commission, or re-argument.

On re-hearing before the full Commission (nine Commissioners sitting, to wit: Commissioners Aitchinson, Lee, Porter, Miller, Mahaffie, Patterson, Splawn, Alldredge and Johnson), Division 4 was affirmed,—four commissioners dissenting. (R. 45-58.) Commissioners Splawn and Patterson dissented on the ground that a tower is not engaged in the business of transportation or carriage under the established law, that nothing in Part III has changed the tower's status in law, and that a tower is not subject to the Act. (R. 55-58.) Commissioner Splawn also joined with Commissioners Johnson and Lee in concluding that towages between points in New York State are not interstate under the definition provided in Section 302 (i)(1). (R. 54, 56-57.)

D. Before the District Court.

On your appellant's petition to the Southern District of New York, under U. S. C. Title 28, Sections 41(27)(28) and 43-48 inclusive, to enjoin, set aside, suspend and annul the Commission's certificate and order, the District Court gave its approval to the interpretations, theories, and conclusions of the Commission, and dismissed the petition. (R. 123-136.)

5. The three issues now presented by the appellant.

A. Under the long established law, and within the meaning of the words as heretofore used by Congress, an inde-

pendent tower is not a carrier. There is nothing in the provisions of Part III to alter the appellant's status as a "non carrier". Therefore appellant is not subject to the provisions for the regulation of common and contract carriers.

B. The appellant's towage services between places in New York State are not "from a place in a State to a place in any other State", and therefore are not interstate under Section 302(i)(1).

C. If it can be found that Congress, by the provisions of Part III, intended to alter the non-carrier status of independent towers, and that such change in status is constitutional, they should be classified only as contract carriers.

FIRST POINT.

A TOWER DOES NOT ENGAGE IN THE BUSINESS OF A CARRIER, AND IS NOT A CARRIER, IN LAW AND IN FACT.

During the long period of development on inland waters like the Hudson River and also on the coastal waters, an important phase of water-borne traffic was the growth of carriers who contracted to transport merchandise and property upon their barges and similar craft without motive power. Such carriers found that they could carry more cheaply by hiring towage services, as required, from independent towers, like the appellant, rather than incur the expense of maintaining their own power. In that branch of water carriage, a most distinctive feature has lain in the fact that the carriers (barge owners) at all times retain the possession and custody of the merchandise upon their barges, through their barge captains and crews, and do not surrender it to the independent tugs.

The courts have consistently recognized the fact that an independent tower contracts to furnish his towage services without assuming any of the contractual obligations of a carrier to the vessels towed and their cargoes, that he therefore does not "engage in the business of a carrier" within the common meaning of the words, and that towage service is merely "the employment of one vessel to expedite the voyage of another." *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 328.

> "Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo. * * *
>
> "The supplying of power by a vessel, usually one propelled by steam, to tow or draw another, is towage * * * The tug does not have exclusive control over the tow but only so far as is necessary to enable the tug and those in charge of her to fulfill the engagement. They do not have control such as belongs to common carriers and other bailees. They have no authority over the master or hands of the towed vessel beyond such as is required to govern the movement of the flotilla. In all other respects and for all other purposes, the vessel in tow, its cargo and crew, remain under the authority of its master; and, in emergency the duty is upon him to determine what shall be done for the safety of his vessel and her cargo. * * * A contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment."
>
> *Stevens* v. *The White City*, 285 U. S. 195, 200.
>
> "It is a great misnomer to call the defendants common carriers, or carriers of any kind in relation to the business of towing boats. Nor are they bailees of any description; for the property towed is not delivered to them, nor placed within their

exclusive custody or control. It remains in the possession, and for most purposes in the exclusive care of the owners or their servants."

Wells v. *The Steam Navigation Co.*, 2 N. Y. 204, at page 208.

In the case of *Sturgeon Bay, etc., Co.* v. *Leathem*, 45 Northeastern Rep. 422, the Supreme Court of Illinois held that a canal company which was authorized by its franchise to charge tolls upon "all boats, vessels, steamboats and other craft used for the transportation of freight and passengers on the canal" did not have any authority to levy tolls upon steamtugs used exclusively for towing the vessels which carried the freight or passengers. At page 423 the Court said:

> "It is assigned as error by appellant that the trial court held as law in the decision of the case the following proposition: 'That under the provisions of the act of the legislature of the state of Wisconsin, under which the plaintiff is incorporated, the plaintiff was authorized to determine and fix the amount of tolls to be charged for the different classes of vessels named in the charter navigating the canal, provided such tolls were reasonable; and also held that this class includes steam tugs as well as other vessels, provided said steam tugs were in the carrying trade; but that they were not permitted to charge for steam tugs while towing vessels through the canal, or on the return trip after making such towage. That the plaintiff is not entitled to recover from the defendants for tolls upon such steam tugs.' The proposition held as law gave a correct construction to section 8 of the charter. The directors were empowered to regulate tolls and charges upon all boats, vessels, steamboats and other craft used for the transportation of freight and passengers on and

> along the canal. The reference here is to boats or vessels used for the purpose of carrying passengers or cargoes of freight. The evidence shows that the tugs operated by the appellees carried neither passengers nor freight, but were merely engaged in towing vessels having on board passengers or freight through the canal."

In *Coup* v. *Wabash etc. Ry. Co.*, 56 Mich. 111, in discussing the nature of a special contract by a railroad company to haul cars owned by a private company, the Court said:

> "It is a misnomer to speak of such an arrangement as an agreement for carriage at all. It is substantially similar to the business of towing vessels, which has never been treated as carriage."

In many of the larger seaports there are towing companies which specialize in furnishing tugs to assist seagoing vessels in docking or undocking. Only by a complete and unwarranted distortion of the common meaning of plain words could it be suggested that those towers are engaged in the business of a carrier by water, either "common" or "contract". Yet, there is no essential difference between those towage services and the towage services rendered by the appellant. Where one tower furnishes tug power to move vessels in or out of docks, the other furnishes similar tug power to move barges along the river.

In the footnote* hereto there are cited only a few of a long line of decisions in which the courts have uniformly

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* *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291, 294; *Steamer Webb*, 14 Wall. 406, 414; *The Margaret*, 94 U. S. 494, 496; *The J. P. Donaldson*, 167 U. S. 599, 603; *Propeller Burlington*, 137 U. S. 386, 391; *The L. P. Dayton*, 120 U. S. 337, 351; *Turecamo* v. *United States* (2nd C. 1942) 125 F. (2d) 1001; *New Orleans etc. Towboat Co.* v. *United States* (5th C. 1936) 86 F. (2d) 53, 60; *The Eastern* (2nd C. 1922) 280 Fed. 711, 712; *Ten Eyck* v. *Director General* (2nd C. 1920) 267 Fed. 974, 977; *Aldrich* v. *Penn. R. Co.* (2nd C.

held that a contract of towage is not a contract of carriage, that a tower is not a common carrier, is not an insurer, is not a bailee of the merchandise on board the vessels towed, and is liable only for negligence in the performance of the towage services.

The Commission itself has reached the conclusion,—indirectly and perhaps unintentionally,—that "towage" is not "carriage", in its opinion in the matter of *Union Barge Line*, 250 I. C. C. 689, basing its opinion on facts which underlie the established law that a tower does not engage in the business of a carrier. In that matter, Union Barge Line, which is admittedly in business as a common carrier, applied for "Grandfather Rights", under Section 309(a), over its entire route on the Mississippi River and on the canal westward of New Orleans, known as the Gulf Intracoastal Waterway. It moves its own barges by its own tugs on the Mississippi, but contracts with Coyle Lines to tow its barges on the canal. The question was raised whether Coyle Lines is a "connecting carrier", and should have the "Grandfather Rights" for the canal, defeating Union Barge Lines's application for that area. The Commission decided that Union Barge Line was entitled to the "Rights" over the entire route and that Coyle Lines, in performing towage services, is not a connecting carrier. While the Commission sought to bring its ruling within the scope of "incidental services" referred to in Section 303(f)(2), the practical conclusion was that Coyle Lines was not en-

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1918) 255 Fed. 330; *The Ashwaubemie* (4th C. 1925) 3 F. (2d) 782, 783; *Southern Towing* v. *Egan* (4th C. 1910) 184 Fed. 275, 277; *The Hardy* (9th C. 1916) 229 Fed. 985, 986; *The Maurice R.* (E. D. N. Y. 1932) 3 Fed. Supp. 86, 89; *The Authentic* (S. D. N. Y. 1936) 15 Fed. Supp. 780, 781; *The Anita D.* (E. D. La. 1939) 28 Fed. Supp. 361, 363; *Mengel Co.* v. *Inland Waterways Corp.* (E. D. La. 1940) 34 Fed. Supp. 685, 690; *The Bellatrix* (3rd C. 1940) 114 F. (2d) 1004, 1007.

gaged in the business of a carrier when performing the towage services, and therefore was not a "connecting carrier". In the course of its opinion, the Commission said:

> "The transportation was under through rates fixed by Union without any agreement, negotiation, or consultation with Coyle Lines as to their amount or their division. The arrangement of Union with Coyle Lines was for the latter to move the loaded and empty barges at charges for the service quoted by Coyle Lines, which charges were arrived at wholly without reference to the through rates to be applied for the through transaction.
>
> "The contract of the shipper was with Union for the entire transportation. Union was the only carrier known to the shipper *** as to the transportation herein considered, the shipper looked only to Union for the through transportation, and Union assumed full accountability for the transportation and the safe delivery of the goods at final destination.
>
> "Union collected the freight charges for the entire transportation, and there is no evidence that the shippers or consignees ever dealt with Coyle Lines with respect to those charges.
>
> "Union supplied its own motive power for movement of the barges over certain of the waterways and contracted with Coyle Lines for towage of the barges on the canal. ***"

Congress, in defining common and contract carriers for purposes of regulation under Part III did not create any new categories but merely used the same common law definitions under which the courts have consistently held that an independent tower is not a carrier. Section 302(d)(d)(e).

In *The Propeller Niagara, etc.* v. *Cordes,* 62 U. S. 7, 22, this Court gave the following definition:

> "A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place."

In *United States* v. *Ramsey*, 197 Fed. 144, at page 146, the Court quoted the following definition from *Moore on Carriers:*

> "A common or public carrier is one who, by virtue of his business or calling, undertakes, for compensation, to transport personal property from one place to another, either by land or water, and deliver the same, for all such as may choose to employ him; and everyone who undertakes to carry and deliver, for compensation, the goods of all persons indifferently, is, as to liability, to be deemed a common carrier."

In *Allen* v. *Sackrider*, 37 N. Y. 341, the Court said at page 342:

> "The distinction between a common carrier and a private or special carrier is, that the former holds himself out *in common*, that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire."

To the same effect are *Stephenson* v. *Binford*, 287 U. S. 251; *Dorr* v. *The New Jersey Steam Nav. Co.*, 11 N. Y. 485.

Earlier legislation by Congress with respect to transportation of merchandise and property by water has not applied to independent towers, because of their non-carrier status.

Section 3 of the Harter Act provided:

> "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America, shall exercise due dili-

> gence to make the said vessel in all respects seaworth and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel. * * *"

In *The Murrell,* 200 Fed. 826, it was held that that Act did not apply to independent towers who furnish towage services to another owner's vessels. *The Murrell,* owned by Baltimore & Boston Barge Company, was towing the barge *West Virginia,* owned by the Eastern Coal Company, and the barge was loaded with cargo belonging to Austin Gove & Son, Boston. During the voyage the *West Virginia* and her cargo were lost through the negligent navigation of the tug *Murrell.* The owner of the tug denied liability, asserting that the tug was engaged in performing a contract to transport the coal, and that §3 of the Harter Act should apply. The Court found that the owner of the tug was furnishing towage services to the vessel of another owner and was performing only a contract of towage so far as the use of the tug was concerned; and that therefore the tug-owner could not defend under the Harter Act. The Court said, at page 829:

> "To say that the owner of the tug, in such a case, is 'engaged in transporting merchandise or property,' is to extend those words of the Harter Act so as to make them include what Congress never intended them to include. * * * There is nothing in an agreement by the owner of a tug to tow another owner's vessel which can be regarded as making the latter vessel or her cargo the cargo of the tug."

That decision was mentioned with approval in *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326, 331, where this Court

pointed out the distinction between a contract of towage and a contract of carriage. In *Bradley* v. *Lehigh Valley R. Co.*, 145 Fed. 569, the Court said at page 573:

> "In the *Nettie Quill*, 124 Fed. 667, a locomotive carried on a barge towed by that steamer was dumped overboard. There a bill of lading was issued by the steamboat, and the court, Toulmin, J., decided that the contract was one of affreightment, rather than of towage, and the Harter Act applied, but there can be no question of the kind here as the relation of the tug was one of towage."

Thus, in previous legislation Congress has been understood to use the word "transportation" synonomously with "carriage", relating solely to "carriers" in the established and generally understood meaning of the words, thereby excluding independent towers who are "non-carriers". There is nothing in the present Act to indicate that Congress used the words with any other meaning when it provided for the regulation of common and contract carriers in Section 309(a) and (f) of Part III, or that Congress tacitly intended to alter the long-established "non-carrier" status of an independent tower.

In the present case, both the District Court and the Commission predicated their opinions on what would seem to be a complete misunderstanding of the basis on which the courts have stated the "non-carrier" status of towers. The Court and the Commission held that that status has been fixed, only with respect to liability of towers in suits for damages,* and therefore is not controlling in interpreting the present Act. (R. 32-33; 47; 130.) Such an argument puts the cart before the horse. Liability of the towers

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* NOTE: The case of *Sturgeon Bay Co.* v. *Leathem*, 45 Northeastern Rep. 422, did not involve damages but a question of toll charges.

has always depended on their status, which has been fixed *by the character of the business which the towers contract to perform*, as the cases cited above plainly state,—not by the mere assertion of liability against them.

SECOND POINT.

AS THE NON-CARRIER STATUS OF INDEPENDENT TOWERS HAS BEEN WELL ESTABLISHED, HAS CONGRESS CONVERTED THEM INTO COMMON CARRIERS BY THE PROVISIONS OF PART III, AND WOULD SUCH A CONVERSION BE CONSTITUTIONAL, EVEN IF CONGRESS INTENDED IT?

These proceedings do not raise the question whether the business of independent towers is "affected with a public interest", which would justify their regulation by Congress. Nowhere in the Act has Congress authorized the Commission to regulate independent towers as such. The comments of the District Court regarding the law that there is no closed class or category of businesses affected with a public interest, (R. 129) have no bearing on the case. The question here is whether Congress has attempted to convert non-carriers into common carriers for purposes of regulation, and whether such an attempt would be constitutional, even if it could be spelled out from the provisions of the Act.

This Court has held that it is beyond the power of a state, by legislative fiat, to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, since that would be to take private property for public use without just compensation, in violation of the due process of law clause of the Fourteenth Amendment. *Hicklin* v. *Coney*, 290 U. S. 169; *Stephenson* v. *Binford*, 287 U. S. 251, 266;

Michigan Commission v. *Duke*, 266 U. S. 570; *Frost Trucking Co.* v. *R. R. Commission*, 271 U. S. 583; and *Smith* v. *Cahoon*, 283 U. S. 553. The infringement of rights would seem to be all the greater if an attempt were made to convert a non-carrier into a common carrier. The appellant does not understand that any later decisions of this Court have modified that basic principle. In other words, even if a business can be regulated by legislative fiat because it is affected with a public interest, the Legislature must regulate that business as such, and cannot convert it into some other type of business for the purposes of regulation.

The Commission was not free to reach its own conclusions herein as to the status of independent towers. Their non-carrier status was previously established quite as definitely as that of a banker or a lawyer. The question is whether Congress attempted to alter their status into that of common carriers by the provisions of Part III.

Throughout the provisions of Part III there is not the slightest reference to independent towers, nor is there any mention of tugs or towage services, with the single exception of Section 303(f) (1) and (2), where Congress provided that towage services would not be subject to the Act even when performed for carriers subject to the Act.

The Commission's attempt to regulate the independent towers has been predicated from the outset on the theory that, when Congress exempted towage services rendered to carriers subject to the Act, Congress must have meant that towage services would be subject to regulation when rendered to persons not subject to the Act: and the District Court, approving the Commission's argument, concluded that the exclusion in Section 303(f) would be meaningless unless towage generally were included in the provisions of Part III. (R. 129.)

The appellant respectfully urges that there is no justification for that conclusion. If Congress had really intended to make the drastic change of converting independent towers from non-carriers into common carriers, it is reasonable to assume that Congress would have said so in plain language, instead of leaving its intent to be spelled out by such a negative or backhanded interpretation of a single exemptive clause. A much more logical explanation of Section 303(f) is that Congress was indicating, as it indicated in other sections of Part III, that the Commission was to be more limited in regulating water carriers than in regulating rail carriers. In other words, incidental services to water carriers, which might have been deemed subject to regulation under the law applicable to rail carriers, as in *Union Stockyard etc. Co.* v. *U. S.*, 308 U. S. 213, were expressly exempted from regulation by that section of Part III.

To alter the long-established "non-carrier" status of an independent tower by converting him into a common carrier would involve a most drastic change in the tower's rights and liabilities. The appellant submits that an executive tribunal, like the Commission, has not the power to make any such drastic change, in the absence of plain language from Congress itself. As this Court said in *Brady* v. *Roosevelt S. S. Co. Inc.*, 317 U. S. 575, 581:

> "We can only conclude that if Congress had intended to make such an inroad on the rights of claimants, it would have said so in unambiguous terms."

Commissioner Splawn said in his dissenting opinion:

> "The undertaking of applicant herein is to render specific services and not to transport goods or property. In the absence of any clear language in the statute declaring towboats to be carriers, and the

doubtful constitutionality of such a declaration or construction, I would find that the common law rule still prevails, and that ordinary towage, such as performed by applicant, is not transportation or carriage, subject to Part III." (R. 56.)

THIRD POINT.

IT IS NOT THE OWNERSHIP AND OPERATION OF TUGBOATS, PER SE, BUT THE CHARACTER OF THE BUSINESS ENGAGED IN BY THEIR OWNER WHICH DETERMINES THE "NON-CARRIER" STATUS OF THE INDEPENDENT TOWER.

The appellant believes that this important distinction was overlooked by the Commission and by the District Court, more particularly in connection with the definitions in Section 302(f), (g) and (h) regarding transportation facilities.

It is wholly irrational to assume that Congress intended to put into the categories of common and contract carriers persons who do not carry anything, merely because they own and use vessels, warehouses, wharves, dockyards, and other "transportation facilities", or furnish incidental services (as the dockyard which repairs the vessels). As there are many carriers by water who own tugboats, piers, vessels, warehouses, dockyards, etc., and use them in the performance of their contracts of carriage, it is logical to assume that in Section 302(f), (g) and (h) Congress meant that the facilities and services described therein, when used or performed by *the carriers themselves,* would come within the scope of regulation of those carriers. The Commission has committed itself to that interpretation by its ruling in *Status of Wharfingers,* 251 I. C. C. 613, that even though a "wharf" is a transportation facility under Sec-

tion 302(g), an independent wharfinger, who carries nothing by water, cannot be deemed a common or contract carrier, subject to Section 309(a) and (f). As Commissioner Splawn said in his dissenting opinion in the present case:

> "We have found only carriers by water are subject to regulation under Part III even though transportation facilities may be furnished by other persons. See Status of Wharfingers, 251 I. C. C. 613." (R. 55.)

The mere ownership and use of tugboats by an independent tower, who does not contract to carry, does not constitute him a carrier. Such a tower should not be confused with those common carriers who own and use tugboats in performing their contracts of carriage.

Union Barge Line Corporation, 250 I. C. C. Rep. 689 (discussed above), is an illustration. *The Barge Line* is a common carrier. It performs its contracts of carriage over the Mississippi River route by loading the merchandise on its own barges and moving the barges by its own tugs. Its tugs are not performing contracts of towage, but are units of the Barge Line's equipment used in performing its contracts of carriage; whereas the tugs of Coyle Lines are performing only towage services when towing for Union Barge Line on the canal.

In *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, a barge line was engaged in the business of a common carrier, entering into contracts with the public to carry merchandise and property on its own barges in tow of its own tugs. In the course of its opinion this Court squarely pointed out that the distinction between such a case and the ordinary case of independent towage service lay in the fact that Sacramento Navigation Company was a carrier engaged in performance of its contract of carriage, the use of its own tug

being merely incidental thereto, whereas an independent tower performs a contract of towage and not a contract of carriage:*

> "Towage service is the employment of one vessel to expedite the voyage of another. Here, while there was towage service, the contract actually made with respondent was not to tow a vessel but to transport goods, and plainly that contract was a contract of affreightment. * * *" (Page 328.)
>
> "Respondent contends that his view to the contrary is sustained by *The Murrell*, 195 Fed. 483, affirming 200 Fed. 826, and *The Coastwise*, 233 Fed. 1, affirming 230 Fed. 505. Some things are said in those cases which, if we should not consider the differences between them and the present case, might justify this contention. The most important of these differences is that in both cases it was held that contracts of towage and not of affreightment were involved. * * * Here, upon all the facts as we have just said, the contract upon which respondent must rest is one of affreightment, the obligation of which is to carry a cargo, not to tow a vessel." (Page 331.)

There is another method of inland water carriage, where the tugowner enters into an agreement with the barge owner to move the barges in consideration of a share of the freight moneys paid by the shippers. There the tug is not furnishing independent towage services, but the tugowner and barge owner are jointly engaged in the performance of a contract of carriage. An illustration of that method of operation is found in *The Hugh O'Donnell*, 22 F. (2d) 410. In that case, while considering the application of Section 3

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* Division 4, in its opinion, misstated applicant's reference to the *Sacramento Navigation Co.* case and both opinions of the Commission ignored the basic distinction between that case and the ordinary case of an independent tower. (R. 30, 47.)

of the Harter Act, the Court expressly recognized the distinction between such operation and an independent performance of ordinary towage services by saying:

> "If the tug had been engaged on a contract of towage pure and simple, perhaps it could be said that, having no interest in the transportation of the freight, she was not engaged 'in transporting merchandise or property' within the meaning of the statute."

Stimson Lumber Co. v. *Kuykendall,* 275 U. S. 207, illustrates the same proposition in connection with an unusual type of carriage. In that case respondents held themselves out as common carriers for the carriage of shipments of logs on one of the western rivers. They "carried" the logs, by attaching their tugs' lines to the floating rafts or clusters. This Court held that the respondents were not rendering towage services but were performing contracts of carriage, just as much as if the logs had been loaded on the decks of the tugs; and the Court expressly pointed out that its decision rested upon the facts of the peculiar business of carriage in which the respondents were engaged. The Court said at page 211:

> "They are common carriers, not because of legislative fiat, but by reason of the character of the business they carry on."

In all such methods of operation as those indicated above, the use of tugs is incidental to the fact that their owners are engaged in the performance of contracts of carriage and receive the goods into their possession under those contracts. The controlling factor is not the use of the tugboat, but the contractual character of the business of her owner.

In Sections 309(a) and (f) of Part III, Congress did not empower the Commission to issue certificates or permits to,

and thereby regulate, tugboats and tugowners, but only persons engaged in the business of common or contract carriers. A tower, who is not a carrier, does not come within those provisions.

FOURTH POINT.

THE DISTRICT COURT AND THE COMMISSION HAVE DISTORTED THE COMMON AND ACCEPTED MEANING OF PLAIN WORDS AS USED BY CONGRESS IN PART III.

In *United States* v. *Temple*, 105 U. S. 97, this Court said at page 99:

> "Our duty is to read the statute according to the natural and obvious import of the language, without resorting to the subtle and forced construction for the purpose of either limiting or extending its operation."

In *Rodenbough* v. *United States*, 25 F. (2d) 13, at page 15, the Court said:

> "In performing this responsible function courts are careful not to be led astray by definitions of single, unrelated words of a statute or by the refinements of lexicographers, but to adhere closely to the use of words in their commonly understood meaning and in immediate relation to their subject matter. Merchants Loan & Trust Co. *v.* Smietanka, 255 U. S. 509 * * *; Doyle *v.* Mitchell Bros., 247 U. S. 179 * * *; Eisner *v.* Macomber, 252 U. S. 189 * * *."

In *Westerlund* v. *The Black Bear Mining Co.*, 203 Fed. 599, at page 605, the Court said:

> "A decisive canon of construction here, however, is that when a word which has a known legal meaning

> is used in a statute it must be assumed that the term is used in its legal sense in the absence of an indication of a contrary intent."

In *Thorn* v. *Browne*, 257 Fed. 519, at page 523, the Court said:

> "When a legislative body selects and uses in a statute words or clauses which before the enactment of the law had acquired by judicial interpretation or common consent and use a well-understood meaning and legal effect, the legal presumption is that it intended that they should have that meaning and effect in the statute it enacts."

Instead of interpreting the words "persons engaged in transportation" and "carriers" as previously defined by the Courts, as used by Congress in earlier legislation, and as commonly understood in the business world, the District Court predicated its opinion on an isolated dictionary definition which is *contra* to the legal, legislative, and customary usage of the verb "transport".

> "Plaintiff literally 'engages in the transportation by water of * * * property * * * for compensation', which is the test under §302(c) and (d), for the dictionary tells us that, nautically, to transport is 'to haul a vessel by hawsers' and a barge is both a 'vessel' and 'property'." (R. 128-129.)

The definition referred to appears in Funk & Wagnalls 1935 Ed. No such definition appears in Webster's "International", the "Century", the "Oxford", Black's or Bouvier's dictionaries, which concur generally in their statements that the verb "transport" and the verb "carry" are synonymous and in their common usage involve the idea of conveying while supporting (*Webster's International Dictionary*).

The definition relied on by the District Court is not only unique amongst dictionary definitions, but is contrary to the common meaning, as accepted by the Courts. For in *The Murrell*, 200 Fed. 826, 827, it was expressly stated that neither the vessel towed nor her cargo is considered as the cargo of the tug,—the tug does not carry or transport either of them. The same commonly accepted meaning of the words is plainly expressed in all the decisions referred to in the First Point of this brief.

In the case of *Chicago, etc., Ry. Co.* v. *Petroleum Refining Co.* (E. D. Ken. 1930), 39 F. (2nd) 629, the Court pointed out that the words "carry", "convey" and "transport" are synonymous, and that there may be movement of an article which does not involve carriage or transportation. The Court said at page 630:

> "A movable article may be moved in two ways. The movement in one way is expressed by the words 'carry', 'convey' or 'transport'. These three words are synonymous and express the same idea. * * *
>
> The movement in the other way is expressed by the words 'pull', or 'draw', or 'push' or 'shove'. * * *
>
> Or, again, one may own a mule and a cart. He may hitch the one to the other and mount the mule and then start the mule moving. In such case the mule is carrying, conveying, or transporting the owner. It is not pulling or drawing him, but it is pulling or drawing the cart. It cannot be said that the mule is either carrying, conveying, or transporting the cart. * * *"

The District Court also distorted the meaning of Section 320(d) in sustaining the Commission's argument that that section authorized the Commission to "label" persons such as your appellant as common carriers for the purposes of the Act, even though they would not have the status of

common carriers before the courts. (R. 130.) Section 320(d) reads as follows:

> "(d) Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part."

Assuming, as your appellant contends, that Congress was intending to regulate only carriers by water as previously defined and recognized, there is no difficulty in understanding that Section 320(d) was intended to preserve to those carriers their rights and obligations under the maritime law of the United States, such as their obligations to comply with the navigation laws and their rights under the laws relating to limitation of liability, fire damage, etc. It is an extreme distortion of the clause to read into it an unlimited delegation of authority to the Commission to "label" as common carriers such persons as the Commission might see fit on the theory that those persons would retain their "non-carrier" status before the courts.

The District Court also distorted the provisions of Section 309(a) and (f) regarding "Grandfather Rights" by concluding that "clearly what Congress meant was that a person is entitled to such a certificate if, on the specified date before the enactment of the legislature, it had been engaged in activities which, after the statute went into effect, would constitute it a common carrier." (R. 130-131.) There is nothing in Section 309(a)(f) or in any other sections of Part III to support that conclusion. It is logical to assume that when Congress undertook to regulate common and contract carriers who were in *bona fide* operation as

such before the Act was passed, it was referring to those categories as they existed under the established law, and was not creating any new categories.

In conclusion, the District Court said:

> "It goes without saying that, since there is substantial evidence to support the Commission's finding, we must sustain it, whether or not we would have made that finding." (R. 131.)

The "substantial evidence" was apparently merely the interpretations which the Commission had placed upon the language of Part III of the Act by an unwarranted distortion of the plain meaning of the words. Your appellant believes that it is for the courts to determine whether the Act has been interpreted properly by the Commission, and that that duty is not fulfilled by finding that the Commission's interpretation, based upon unwarranted distortion of the language of the Act, should be approved, even though the courts may consider that the interpretation is wrong.

FIFTH POINT.

EVEN IF THE APPELLANT CAN BE SUBJECTED TO THE ACT, AS A CARRIER, ITS TOWAGES BETWEEN PLACES IN NEW YORK STATE ARE NOT INTERSTATE WITHIN THE PLAIN DEFINITION IN SECTION 302(i)(1).

Both the District Court and the Commission refused to accept the plain wording of Section 302(i)(1), and insisted that, in spite of its difference in wording, it should be interpreted to have the same meaning as the definitions in Parts I, II and IV of the Act. (R. 37-39; 48-53; 131-134.)

The definitions of interstate transportation for rail, motor, and freight forwarders in Parts I, II and IV contain specific language which, directly or indirectly, provides that transportation between places in the same state, but passing through another state, is interstate.*

But with respect to water transportation, Congress furnished the definition,—"wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States." Part III, Sec. 302(i)(1).

The intent of Congress to put water carriers on a basis different from that of the other carriers is found in Section 303(g) where water transportation, even between different states, is exempted when performed within the limits of a single harbor or places in contiguous harbors.

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* The definition for rail carriers in Part I, sec. 1(2)(a), is:

"The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply——

"(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State * * *"

The definition for motor carriers in Part II, sec. 203(a)(10) is:

"(10) The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

The definition for Freight Forwarders in Part IV, sec. 402(a)(6) is:

"The term 'interstate commerce' means transportation (A) between a point in a State and a point in another State, whether or not such transportation takes place wholly within the United States; (B) between points within the same State but through any place outside thereof; or (C) from or to any point in the United States to or from any point outside thereof, but only insofar as such transportation takes place within the United States."

Commissioner Splawn, in his dissenting opinion, discussed the reasonable explanation of the special definition which Congress furnished for water carriers:

> "The conclusion in the report rests almost entirely upon the alleged similarity with the provisions of part I. This analogy is unsound because the exact routes of water carriers are indefinite as compared with railroads, particularly where the waterway constitutes a boundary, and because part I was not the result of a single enactment but rather the consequence of many statutes and much interpretation. In the enactment of parts II and IV, the Congress for the purposes of those parts, has specifically included within the definition of interstate commerce, transportation between points within the same State through another State. The failure to include a similar provision in part III can mean only that Congress intentionally limited jurisdiction to transportation between points in different States. This construction is also consistent with the fact that part III contains numerous exceptions and exemptions which are evidence of the Congressional intent to confer more limited jurisdiction than has been given in the other parts of the act." (R. 57.)

In its consideration of Section 302(i)(1), the District Court made two serious misstatements. It said:

> "It is true that this interpretation has been said (152 Fed. at 272) to be strengthened by the fact that §1(2) in Part I provides that jurisdiction over railroads shall not apply 'to transportation * * * wholly within one state.' But §303(h) in Part III similarly precludes jurisdiction, as to water carriers, over 'intrastate transportation' ". * * * (R. 132.)

> "Congress must be deemed to have known in 1940 that the courts had held that the language employed in Part I had precisely the meaning of the language

employed in Part II. Congress then had a choice of two methods of expressing the same intention; therefore no significance can be given to the fact that, when it enacted Part III in 1940, it selected the language which it had used in Part II." (R. 132.)

The words "wholly within one state" in §1(2) of Part I were a part of the definition itself and were the very basis of the interpretation that rail transportation would be interstate if not wholly within one state. No such words (in any form,) appear in the definition for water carriers in Section 302(i). The District Court's reference to 303(h) is an apparent error. If the Court meant to refer to 303(k), it is obvious from the text that that clause was not part of the definition of interstate commerce for water carriers, and what it referred to as "intrastate" would depend on the definitions in Section 302(i).

Congress in writing Part III, Section 302(i)(1) did *not* select or use the language of the definition in Part II, as the District Court's own quotations show. The fact that Congress, with the full knowledge of earlier definitions which the District Court imputed to it, saw fit to write an entirely new definition for Part III must have significance.

Over 95% of the appellant's annual towage services is performed between points in New York State. The appellant contends that those services are intrastate, and are not subject to regulation under Section 302(i)(1), even if appellant is to be held a carrier under Part III.

There is no evidence in the record that the appellant's towage services between points in New York City and other points in New York State on the Hudson River are performed outside of the waters of the State. Finding of Fact No. 6 of the District Court, that "the undisputed evidence is

• • • that most of its tows crossed into New Jersey waters for some seven or eight miles and were obliged to do so because for that distance the navigable channel of the Hudson River lies west of the New York-New Jersey boundary line", (R. 135), is not supported by any evidence and is contrary to the actual fact.

The Hudson River, above the point about opposite Hastings, New York, lies wholly within the geographical limits of New York State. Below that point, the easterly geographical boundary of New Jersey lies under the center line of the river. But the whole of the surface of the river opposite Manhattan is exclusively within the jurisdiction of New York, by Article 3 of the Treaty of 1833, between the two states. *Ferguson* v. *Ross*, 126 N. Y. 459; *The People* v. *Central R. R. Co. of New Jersey*, 42 N. Y. 283; *Carlin* v. *New York, New Haven & Hartford R. R. Co.*, 135 N. Y. App. Div. 876, 880.

Thus, the only stretch of the waters of the Hudson which is not wholly within the jurisdiction of New York State is the 7 or 8 miles, referred to by the District Court, between the upper end of Manhattan and Hastings. The official Government charts show that along that 7 or 8 mile stretch, the main and best channel is on the easterly or New York side of the center. There is no evidence that appellant's tugs navigate on the New Jersey side along that stretch,—much less is there any evidence that they are obliged to do so to follow the channel.

But if the tugs were to navigate on the New Jersey side of the stream, the towages between points in New York would not thereby become "interstate".

In *Cornell Steamboat Company* v. *Sohmer*, 235 U. S. 549, this Court ruled that plaintiff's towage services between New York City and other points in New York State

on the Hudson River are not interstate commerce, even though they may pass through portions of the river lying over the geographical boundary line of New Jersey. The Court said at page 560:

> "That interstate commerce is necessarily taxed is said to arise from the fact that the business of the Company is in fact interstate commerce, as shown by its additional return, from which it appears that vessels for up-river points on the Hudson River are taken by tows, which are made up at a stakeboat located at Weehawken, which is within the territorial limits of New Jersey, that these stakeboats are anchored in the river just below Weehawken ferry, and that the course up the river is in territory of New York and New Jersey. But transportation between the ports of the State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State. *Lehigh Valley Railroad* v. *Pennsylvania,* 145 U. S. 192; *Ewing* v. *City of Leavenworth,* 226 U. S. 464, and see *Cincinnati Packet Co.* v. *Bay,* 200 U. S. 179, 183. * * * It is evident that the making up of the tows for the State ports in the river below Weehawken was for convenience in conducting domestic transportation.
>
> "We are of the opinion that commerce thus carried on is not interstate commerce, * * *."

In *Cincinnati etc. Packet Co.* v. *Bay,* 200 U. S. 179 in connection with a question whether a contract for the sale of certain steamboats operating between Cincinnati and other points in Ohio, on the Ohio river, contemplated an interference with interstate commerce, Mr. Justice Holmes said, at page 183:

> "It might be enough, perhaps, to answer the whole contention, that it does not appear on the rec-

ord that the contract necessarily contemplated commerce between the states. It would be an extravagant consequence to draw from *Hanley* v. *Kansas City Southern R. Co.*, 187 U. S. 617,—a case of a state attempting to fix rates over a railroad route passing outside its limits,—that the contract was within the Sherman Act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points. It may be noticed further that Ohio equally has jurisdiction on the river. Wedding *v.* Meyler, 192 U. S. 573.

Even without recourse to the definition of Section 302(i)(1) of Part III, appellant believes that its towage services between points in New York are not interstate commerce. "For commercial purposes the entire river may be considered the boundary line between the two states." (Dissenting opinion of Commissioners Johnson and Lee, R. 55.)

In any event, under the plain definition set forth in Section 302(i)(1) there is no reasonable basis on which to hold that these services are interstate.

SIXTH POINT.

IF PART III HAS ALTERED THE STATUS OF INDEPENDENT TOWERS TO THAT OF CARRIERS, THE APPELLANT SHOULD BE CLASSED ONLY AS A CONTRACT CARRIER.

As Division 4 found, on the undisputed evidence, over 85% of the appellant's business is done under time contracts with its customers, running from one to three years, 12% to 13% being miscellaneous business contracted for from day to day; and all of its business is done on separate agreements or contracts (R. 27). The appellant contracts

to furnish towage services to meet the special requirements or operations of each of its regular customers (R. 19). A form of appellant's special contract is in evidence (R. 110). The miscellaneous business is accepted only when offered on terms satisfactory to the appellant.

Certainly the appellant was not holding itself out as a common carrier on January 1st, 1940, eight months before the passage of Part III, because at that time it was doing business in the well-established status of a "non-carrier". And in offering its services on terms relieving it from liability for negligence, it was not contracting on a common carrier basis. There is no factual basis for the Commission's conclusion that on January 1st, 1940, the appellant was holding itself out to the public as a common carrier (R. 41; 48; 53-54).

The fact that the appellant has been in business so many years that it is widely known, or the fact that the appellant, like other business concerns, may be willing to contract for new business which is satisfactory to it and which it can conveniently perform on its "non-carrier" terms, do not justify a finding that appellant has been holding itself out as a common carrier.

If the independent towers have been converted into carriers by Part III of the Act, a classification as contract carriers would preserve, more closely, the rights on which they have built up their business over a long period of years.

Conclusion

1. If, as the appellant contends, it is not a common carrier and is not engaged in the business of a carrier, and is not subject to Part III of the Transportation Act of 1940, this Court should reverse the order of the District

Court and should enter an appropriate order to the end that the certificate and order of the Interstate Commerce Commission, dated February 2, 1943, and each and every part thereof shall be suspended, set aside and annulled and perpetually enjoined, and that the Commission be directed and enjoined to reinstate the proceedings before it and to grant the appellant's petition to dismiss its application, for lack of jurisdiction.

2. In the alternative, if this Court shall find and conclude that appellant is a carrier within the terms and provisions of Part III of the Transportation Act of 1940, the Court should find that appellant's towage services between points in New York State are not interstate transportation within the definition of Section 302(i)(1) thereof, and should also find that on the undisputed evidence the appellant should be classed only as a contract carrier under the said Act; and an appropriate order should be entered to the end that the Commission be directed and enjoined to reinstate the proceedings before it and modify its findings, certificate, and order, accordingly.

Respectfully submitted,

ROBERT S. ERSKINE,
Counsel for Appellant.

New York, N. Y., December 27th, 1943.

APPELLANT'S BRIEF

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Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 384.

CORNELL STEAMBOAT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NATIONAL WATER CARRIERS ASSOCIATION, INC.,
Appellees.

No. 385.

BOSTON TOW BOAT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NATIONAL WATER CARRIERS ASSOCIATION, INC.,
Appellees.

BRIEF ON BEHALF OF BOSTON TOW BOAT COMPANY, APPELLANT.

ALBERT T. GOULD,
CHARLES S. BOLSTER,
Attorneys for Appellant,
BOSTON TOW BOAT COMPANY.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

	Page
The background of and reasons for Boston Tow Boat Company's participation in this litigation	1
Argument	3
The District Court erred in holding and ruling that Cornell is a "Carrier by Water" within the meaning of the Act	4
Conclusion	14

Table of Authorities Cited.

Cases.

Ellis v. Interstate Commerce Commission, 237 U.S. 434 (1915)	13, 14
General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940)	10, 14
Hoffman v. Palmer et al., 129 F. 2d 976	7n.
Status of Wharfingers, 251 I.C.C. 613	12

Statutes.

28 U.S.C. § 45a (Judicial Code, §§ 212, 213)	2n.
28 U.S.C. § 695	7n.
49 U.S.C. § 1 (3) (a) (Interstate Commerce Act, Part I)	12
49 U.S.C. §§ 901-923 (Interstate Commerce Act, Part III)	2, 8, 14
49 U.S.C. § 902 (Interstate Commerce Act, Part III)	4, 5, 12, 14
49 U.S.C. § 905 (a) (Interstate Commerce Act, Part III)	13

Textbooks.

Webster's New International Dictionary, Second Edition Unabridged 1942	6
Funk & Wagnall's New Standard Dictionary, 1935 edition	6
Oxford New English Dictionary	6, 7

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 385.

BOSTON TOW BOAT COMPANY,

Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NATIONAL WATER CARRIERS ASSOCIATION, INC.,

Appellees.

BRIEF ON BEHALF OF BOSTON TOW BOAT COMPANY, APPELLANT.

The Background of and Reasons for Boston Tow Boat Company's Participation in This Litigation.

Boston Tow Boat Company* (like Cornell Steamboat Company†) is a tower for hire. It operates a fleet of fifteen tugs. It tows and assists vessels on the New England coast and in Boston Harbor and other New England ports, and has done so for many years. It is not in fact or in law a carrier. It issues no bills of lading or other forms of agreement for carriage. It has never had (except in one instance) any direct relationship to the shippers of

*Hereinafter referred to as "this appellant."
†Hereinafter referred to as "Cornell."

goods laden on the towed *and carrying vessels.* It contracts merely to tow the cargo carrying vessels of carriers in order to expedite *their* movements and those of *their* cargoes.

This appellant's earlier proceedings before the Interstate Commerce Commission,* pursuant to the requirements of Part III of the Interstate Commerce Act (U.S.C. Title 49, §§ 901-923, incl.), are briefly reviewed in Article Fourth of its petition to intervene in Cornell's proceedings in the Southern District of New York (R. pp. 68, 69). On June 25, 1943, this appellant filed with the Secretary of the Commission a petition for rehearing before the full Commission, which was denied on August 2, 1943.

Meanwhile, on June 22, 1943, at the trial and argument of Cornell's suit before the statutory three-judge court in the Southern District of New York (now here on these appeals), this appellant intervened† in that proceeding in order to join with Cornell in contending (see Cornell's assignments of error 1 to 6, inclusive, R. pp. 139, 140) that, as a tower for hire, Cornell is not a carrier within the terms and provisions of said Act.

The facts and considerations upon which will be based a determination of this appellant's status as a carrier (if it is a carrier at all) are not now before this Court.‡ If,

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*Hereinafter referred to as "the Commission."

†This appellant's intervening petition was filed pursuant to authority contained in U.S.C. Title 28, § 45a (Judicial Code, §§ 212 and 213), providing (*inter alia*) ". . . that . . . corporations . . . who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; . . ."

‡On August 20, 1943 (and subsequent to the decision below in these proceedings), this appellant filed in the District Court for the District of Massachusetts a suit similar to that filed by Cornell

however, this Court should decide that Cornell is a carrier under this Act because of some particular fact or set of facts peculiar to Cornell's operations, this appellant reserves its right to contend that the facts underlying its own towing operations are such as to bring the question of its status outside the scope of that of a carrier.

Argument.

The basic issue whether or not towers for hire are carriers within the terms and provisions of the Act has been argued in Cornell's brief in its Points First to Fourth, inclusive.

This appellant is not concerned with the arguments advanced in the Fifth Point of Cornell's brief, since the problems there discussed are peculiar to Cornell and do not concern this appellant and its operations.

While this appellant has also contended in its suit now pending in the District of Massachusetts that, if a carrier at all, it is a contract carrier and not a common carrier, the facts underlying this appellant's towing operations are quite different from those underlying Cornell's operations; and this issue, as it concerns this appellant, will be pre-

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in the Southern District of New York, wherein this appellant alleged that the fundamental issue whether or not towers for hire are carriers within the terms and provisions of said Act would be considered by this Court in these proceedings. This appellant, however, prayed in said suit that, if this Court should determine, despite the arguments advanced on these appeals, that towers for hire are carriers within the terms and provisions of said Act, the District Court in Massachusetts would determine whether this appellant is a contract carrier (as it contends), or is a common carrier (as the Commission has ruled). Further prosecution of this appellant's suit in Massachusetts has since been held in abeyance by agreement of the parties, pending the decision of this Court in these proceedings.

sented and developed in due course before a statutory three-judge court in the District of Massachusetts.

This appellant considers that no good purpose would be served by repeating the arguments advanced under Points First to Fourth, inclusive, of Cornell's brief, even in paraphrase. It believes, however, that it may, without impropriety, call this Court's attention more fully to the language of the Act and the manner in which the Act should be construed. Moreover, this appellant desires to make clear that the fundamental question whether or not towers for hire are carriers under the Act is of the utmost importance to towers other than Cornell who have carried on the business of towing for hire for many years under long-established rules of business practice and of applicable law; and the courts should not impute to the Congress a purpose to cause a departure from such long-established custom and doctrine unless it can be clearly discerned from the language of the legislation that such a departure was intended to result from such legislative action, and then only if the legislation itself is such as to accomplish that purpose.

The District Court Erred in Holding and Ruling that Cornell is a "Carrier by Water" within the Meaning of the Act.

The court below apparently based its decision* upon certain interpretations placed by it upon the several sentences of definition in § 902 of the Code.† A careful reading of the Act does not support the decision below.

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*Paragraph 1 of the opinion (R. pp. 128, 129).

†In this brief, we have followed the U.S. Code section references ("900 series"), whereas, in Cornell's brief, the "300 series" of section references of the Act has been used. These two series are otherwise identical, *e.g.*: 902 is the same as 302, 905 as 305, etc.

The scope of the Act is set forth in said § 902, headed "DEFINITIONS."

The term "water carrier" is by subsection (c) defined as "a common carrier by water or a contract carrier by water." By subsections (d) and (e) a "common carrier by water" and a "contract carrier by water" are defined as persons engaged "in the transportation by water" of passengers or property. Subsection (h) provides that "The term 'transportation' includes the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and includes any and all services in or in connection with transportation, . . ." Subsection (g) provides that "The term 'transportation facility' includes any vessel, [etc.] . . . used in or in connection with transportation by water subject to this chapter."

Note particularly that in subsections (c), (d), (e) and (f) the Congress employed the words "*mean*," *e.g.*: "The term 'water carrier' *means* . . ."; "The term 'common carrier by water' *means* . . ."; etc. On the other hand, in subsections (g) and (h) the word "includes" is used, *e.g.*: "The term 'transportation facility' *includes* . . ." and "The term 'transportation' *includes* . . ." (Italics supplied.)

In view of the discriminating use by the Congress of the language above cited, it is clearly apparent that subsections(c), (d), (e) and (f) are definitions; whereas subsections (g) and (h) are merely descriptions of transportation facilities and transportation, respectively, *used or performed by carriers*. Furthermore, in subsections (g) and (h) the word "transportation" is itself used as part of the description; and it is apparent that these sections were inserted for the purpose of including, within the meaning of "transportation," acts or services which might not otherwise be included, rather than for the purpose of com-

pletely defining the subject-matter. These subsections do not tell the reader what "transportation" is. They do tell him that it includes certain things. The reader is compelled to resort to the usual dictionary definition as a starting point for any attempt to determine what the Congress intended.

To transport anything, in the usual plain meaning of the word, is to carry it. Similarly, to carry it is to transport it; and carriage is the act of carrying, or transporting. These words have an interchangeable use.

In the brief submitted below by counsel for appellee National Water Carriers Association, Inc., it was suggested that the transitive verb "to transport" means "to haul a vessel by hawsers." This particular definition is found in the 1935 edition of Funk & Wagnalls New Standard Dictionary, which, in full, is as follows:

> "Transport (vt.) 1. To carry or convey from one place to another. (2) Naut. To haul (a vessel) about a harbor by hawsers. 2. To lift or exalt into a state of intense mental excitement or ecstasy; enrapture; ravish; carry away. (2) To carry beyond the bounds of moderation."

The court below apparently seized upon this definition as being most to its liking.

In Webster's New International Dictionary, Second Edition Unabridged 1942, this transitive verb is accorded five definitions, only the first of which is in any way applicable to the use of the verb "to transport" in the Act. It is:

> "1. To convey; esp., to carry or convey from one place or station to another, as by boat or rail; to transfer; as, to *transport* goods or troops."

In the Oxford New English Dictionary the first definition given of the verb "to transport" is "to carry, convey or

remove from one place to another." None of the other definitions can possibly be applied to the use of this verb in the Act; and in the exhaustive historical note to this verb the Oxford Dictionary does not even suggest the definition invoked by the lower court.

We assume that the source from which a word in current use is derived is still valid authority in considering a proper interpretation of such word. The verb "to transport" comes, of course, from the Latin *transportare*, which (literally translated) means "to carry across." The District Court's statement that "Nautically, to transport is 'to haul a vessel by hawsers'" (R. p. 129) entirely overlooks the fundamental fact that the vessel which is hauled (or towed) is the carrying vessel and the hauling vessel is not also a carrying vessel, merely because it hauls, when it carries nothing.

It will accordingly be observed that the lower court went out of its way to adopt a definition which would help to support its obviously desired interpretation of the Act.*

*In this connection see *Hoffman* v. *Palmer et al.*, 129 F. 2d 976; affirmed, 318 U.S. 109. That case involved an action against the trustees of the New Haven Railroad for wrongful death and personal injuries arising out of a grade-crossing accident; and, at the trial, a statement signed by the then deceased locomotive engineer was excluded because it had not been made in the "regular course of business." In the opinion of the Circuit Court of Appeals for the Second Circuit, which was also written by Judge Frank, it was held that the exclusion of this statement was proper, both under the common law and under the federal statute (U.S.C., Title 28, § 695) rendering admissible "any writing or record, . . . made as a memorandum or record of any act, transaction, occurrence, or event, . . . if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record. . . ." At page 983 the court said significantly:

> "The words, 'regular course of business', twice employed in the legislation, are not colloquial words but are words of art, with a long history, and, as we have observed, often there-

This is in violation of well-established rules of proper statutory construction.

To say that anyone who does any of the things which the Act includes as "transportation" must be a carrier subject to regulation under the Act leads to impossible conclusions. For example, since a transportation facility "includes" any vessel and any equipment of any kind used in connection with transportation, and since transportation "includes" the use of a facility and "includes" all services in connection with transportation, it might be argued that a ship repairman who uses an electric drill in making repairs to the engine of a vessel used in interstate commerce, or a carpenter engaged in repairing the caplog of a wharf where interstate cargoes are handled, is engaged in transportation and is himself a carrier subject to the Act. That such a result was not intended is obvious. *The Act has for its purpose the regulation of persons who enter into contracts of carriage and who deal with such members of the public as are shippers of goods.* This is patent from a careful reading of Part III and the repeated references to "property," "commodities," "bills of lading" and other language appropriate to shipments. When Congress said that transportation includes the use of a transportation facility and includes all services in connection with transportation and the handling of property transported, it meant the use of a facility by a person who

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tofore judicially interpreted. Consequently, they should be given that settled meaning when incorporated in a statute, absent a contrary legislative intention clearly expressed in the statute or in its legislative history."

Contrast this interpretation of legislative intent with that invoked in the case at bar.

In affirming that decision, this Court said at page 114 (in substance) that the "words of the Act" should be confined to "their historic meaning."

was otherwise a carrier, or the rendering of services and handling of property by a person who was otherwise a carrier. It can scarcely be contended that the ship repairman and the carpenter who have been adverted to are carriers subject to the Act. While a hasty or casual reading of subsections (g) and (h) might give the impression that they are engaged in transportation for compensation, still they are not in the ordinary meaning of the words engaged in transportation or in occupations which are usually considered to be carrier occupations; in short, *they are not carriers.*

From the foregoing analysis of the "definitions" the most that can be said on behalf of the appellees is that a "water carrier" is (1) a person engaged "in the transportation by water" of passengers or property, *i.e.*, a carrier; or (2) one engaged in transportation by water of passengers or property (*i.e.*, a carrier) who uses a transportation facility in performing its act of carriage. We concede that a tugboat is a "vessel . . . used . . . in connection with transportation by water . . ." and therefore a "transportation facility"; but we strenuously deny that a tugboat is a carrier merely because it is used by a carrier as a transportation facility. The use by a carrier of a transportation facility constitutes a part of the act of carriage performed by the carrier, and thus subjects the facility indirectly to regulation through the regulation of the carrier who uses the facility. It does not, however, make the owner of the facility a carrier subject to regulation directly. It does not make the owner of the facility a carrier when he is not engaged in the business of a carrier. It should be carefully noted that the certificate or permit provided for in the Act is not issued to a "vessel" or to a "transportation facility," but is issued to a person to "engage in the business of" a carrier.

In *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940), the Court said at page 428:

> "Freight cars are *facilities of transportation*, as defined by the Act. The railroads are under obligation, as part of their public service, to furnish these facilities upon reasonable request of a shipper. . . . They are not, however, under an obligation to own such cars. They may, if they deem it advisable, lease them so as to be in a position to furnish them according to the demand of the shipping public and, if the carriers do so lease cars, the terms on which they obtain them *are not the subject of direct control by the Interstate Commerce Commission.* If the carriers pay too much for the hire of such cars the Commission may, of course, refuse to allow them to reflect such excess cost in their tariffs. *The lessor of such cars to a railroad, however, is not itself a carrier or engaged in any public service.* Therefore its practices lie without the realm of the Commission's competence." (Italics supplied.)

Towers are virtually in the same relation to the owners of carrying vessels as the owners of freight cars are to the carrying railroads. The tower contracts with the carrier to tow its barge at a price, whereas the owner of the freight car (also a "transportation facility") agrees to let its car to the carrier (railroad) at a price. Moreover, the freight car actually carries the goods transported by rail; and yet its owner does not become a carrier by reason of the use of its freight car. *A fortiori*, the owner of a tugboat *which carries nothing* does not become a carrier by reason of its ownership of the tug or by the *use by a carrier of the tug* as one of several "transportation facilities."

Furthermore, every use of a tug as a "transportation facility" necessarily involves a carrying vessel, and therefore necessarily involves a carrier, who is himself sub-

ject to regulation. It is with that carrier only that the shipper deals in connection with a particular movement of his property; and the shipper is given adequate protection by the regulation of that carrier.

Nowhere in the Act does the Congress provide specifically for the regulation of towers as such, and whatever basis may be found in the Act for bringing them within its scope must be found in the subsections above referred to. Accordingly, unless a tower is included in a category to which is applied the term "water carrier" or "common carrier by water" or "contract carrier by water," it is obvious that the Congress did not include towers within the scope of the Act.

Towers for hire have never been regarded as carriers. They have not even been considered bailees of the vessels towed or of the goods laden on board the towed carrying vessels. A tugboat operator merely furnishes motive power for a non-self-propelled carrying vessel. A tugboat is, indeed, the transportation-facility equivalent of the wind, which was once largely used to propel sailing vessels over the water. It is nothing more.

True, the wind cost nothing, which was one advantage accruing to water carriers who carried by sail. The mere fact that the tower must be compensated by the carrier whose vessel he tows is not enough to cause the status of the tower to be converted into that of a carrier, since (as pointed out, *supra*) the amount of the tower's charge is automatically and necessarily reflected in the charge made *by the carrier to the shipper.*

Viewed in the light of the foregoing exposition, the Act *"means"* merely that common carriers and contract carriers by water are to be regulated by the Commission; that such carriers are persons who (either by holding out or under contract) engage in the transportation (*i.e.*, carriage) by water of passengers or property—in other words,

carriers; and that, in the course of such transportation by the carriers, the carriers may themselves use any transportation facility (such as a tugboat). The mere use, however, by a carrier of a tugboat, as one of several available transportation facilities, does not thereby endow the tugboat and her owner with the attributes of a carrier. Cf. *Status of Wharfingers,* 251 I.C.C. 613. The use by the carrying vessel of a towing facility to assist in getting the carrying vessel to her destination (which, after all, is the only reason for using a tugboat anyway) is the use of a transportation facility offered *by the carrier to the shipper* as an inducement to the shipper to forward his goods *via* that particular carrier rather than by another carrier.

The language of subsections (g) and (h) is so similar to that used in Part I of the Act that it is to be presumed that it was modeled upon Part I. The provisions of Part I are stated to apply to common carriers engaged in transportation of passengers or property. "Common carrier" includes all persons engaged in "transportation . . . as common carriers for hire." The Act then declares [U.S.C. Title 49, § 1 (3) (a)] that—

> "The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

The last clause of this section is in words substantially identical with the last clause of § 902 (h). Note also that the words "shall include" likewise connote a description

of the "facilities" which a person engaged in transportation as a common carrier for hire may use as part of *his* act of carriage.

Ellis v. *Interstate Commerce Commission,* 237 U.S. 434, (1915), involved the owner and maintainer of refrigerator cars which were supplied by the owner to the railroad or to the shipper for use in the transportation of perishable commodities. The car owner also operated icing stations and undertook to keep the cars iced in transit. It was argued that the person owning, maintaining and icing these cars was a common carrier because the definition of "transportation" included such activities. The Court said, at pages 443, 444:

> "It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth."

The description of "transportation" in Part III is likewise "a preliminary to a requirement that the" carrier by water shall furnish such transportation within the limits of its holding out. Section 905 (a) of the Code so provides. The decision in the *Ellis* case is a clear holding that the ownership or operation of a transportation facility or the performance of a service within the category of "transportation" does not *ipso facto* bring the owner, operator or performer within the class of persons regulated as a carrier, but that a carrier otherwise subject to the Act is subject to regulation in all the elements that are "included" as a part of the "transportation" performed by him. The person who does something within the scope of "transportation" is not thus made a carrier unless in all

truth he was, apart from the element of "transportation," a carrier subject to the Act. The holding of the *Ellis* case has recently been approved by this Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 428, *supra.*

To put it the other way, and with particular reference to Part III, the provisions of § 902 (g) and (h) delimit the extent of the activities of a "carrier" which are to be regarded as the transportation performed by him, and thus subject to regulation. The question whether or not he is a carrier is left to the common law. By that test a tower is not a carrier.

Conclusion.

This appellant submits that towers for hire (and these appellants as such) are not carriers, are not engaged in the business of carriers, and are not subject to Part III of the Interstate Commerce Act; and that this Court should reverse the order of the statutory court in the Southern District of New York and should enter an appropriate order to the end that the certificate and order issued by the Commission on Cornell's application dated February 2, 1943, and each and every part thereof, shall be suspended, set aside, annulled and perpetually enjoined; and that the Commission may be directed and enjoined to reinstate before it the proceedings involving Cornell and this appellant, and to take appropriate action thereon in accordance with the order of this Court.

Respectfully submitted,

ALBERT T. GOULD,

CHARLES S. BOLSTER,

Attorneys for Appellant,

Boston Tow Boat Company.